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CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES
UNDER ARTICLE 40 OF THE COVENANT

Addendum

PEOPLE'S REPUBLIC OF CHINA
HONG KONG SPECIAL ADMINISTRATIVE REGION*

[1 November 1999]

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Report of the Hong Kong Special Administrative Region of the People's Republic of China in the light of the International Covenant on Civil and Political Rights: supplementary information

Introduction

1. The information provided here is mainly an attempt to respond to comments submitted to the Legislative Council Panel on Home Affairs for discussion at special meetings held – between Panel Members, NGOs[1], and representatives of the Hong Kong SAR Government – on 23 September and 12 October 1999. It also covers the joint submission by 16 NGOs, which was submitted to the Committee direct. With the exception of the issue of right of abode – which we have elected to address under the heading of the Rule of Law – we address those comments in relation to the relevant Article of the Covenant.

2. We have attempted to address these comments as comprehensively as possible. But time constraints and the sheer volume of comments received have inevitably necessitated a degree of selectivity. Where we have thought it appropriate, we have referred the Committee to the relevant sections of our report rather than repeat them here. Where the Committee requires further information, we will do our best to provide it in the course of the hearing.

GENERAL PROFILE

Rule of law

3. The Committee will be familiar with the issues – discussed in paragraphs 230 to 239 of the report – in respect of Article 12 of the Covenant – in relation to the right of abode. In paragraphs 234 to 238, we discussed the then ongoing test cases of Cheung Lai-wah and Chan Kam-nga, indicating that the Court of Final Appeal would hear them in January 1999. The Court delivered its judgement on 29 January. Among the several matters that it covered, the judgement gave rise to two questions of particular concern:

- First, the Court held that – under Article 24(2)(3) of the Basic Law – Mainland persons were eligible for the right of abode if either of their parents was a permanent resident at the time of their birth and – importantly – if either parent acquired permanent resident status after their birth;

- Secondly, the Court held that Mainland residents who had the right of abode in Hong Kong under Article 24(2)(3) of the Basic Law were not bound by the requirement under Article 22(4) of the Basic Law to obtain from the Mainland authorities permission to enter Hong Kong for settlement.

We have elected to address this issue ahead of all others as it impinges on the fundamental question of the rule of law: the bedrock on which all human rights are founded.

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[1] The NGOs in question were Amnesty International Hong Kong Section, the Democratic Party, the Equal Opportunities Commission, the Hong Kong Bar Association, the Hong Kong Christian Institute, the Hong Kong Human Rights Commission, the Hong Kong Human Rights Monitor, the Hong Kong Journalists Association, and Justice (Hong Kong Chapter). They also include the Frontier, whose submission reached us on 21 October.

4. After thoroughly reviewing the Court's decisions, we came to the view that the Court's understanding of Articles 22(4) and 24(2)(3) of the Basic Law might not truly accord with the legislative intent of those provisions. Our own understanding of that intent derived from a careful analysis of the documents relating to these articles and drafting history of the immigration laws that they affect. A practical – and disturbing – consequence of the judgement was the extension of the right of abode to a very large number of people: both in terms of absolute numbers and, more importantly, in terms of Hong Kong's physical capacity to absorb additional permanent population.

5. We carefully considered all options for resolving this problem, including seeking an amendment of the relevant provisions of the Basic Law and seeking an interpretation of those provisions. Both are lawful and constitutional options under the Basic Law. The power to amend the Basic Law is vested in the National People's Congress (NPC) of the People's Republic of China. The power of interpreting it is vested in the NPC's Standing Committee (NPCSC). We decided to seek an interpretation on the principle that there is a fundamental difference between an interpretation and an amendment. An interpretation is based on the true legislative intent of a provision. An amendment changes that legislative intent. Thus, in seeking an interpretation, we sought to clarify the true legislative intent of the relevant provisions, not to change that intent. The decision received the support of the Legislative Council in the Motion Debate held on 19 May 1999. And independent opinion polls demonstrated that 60 per cent of respondents also supported it.

6. Article 48(2) of the Basic Law confers on the Chief Executive (CE) the constitutional responsibility for the implementation of the Basic Law. In view of the problems encountered in implementing the Basic Law in respect of Articles 22(4) and 24(2)(3) – and in the light of the exceptional circumstances discussed in paragraph 4 above – the CE asked the State Council to request the NPCSC to interpret the two articles in accordance with the legislative intent of the provisions. The NPCSC announced its interpretation on 26 June. The interpretation (text at Annex A) made two things clear:

- First, under Article 24(2)(3) of the Basic Law, persons of Chinese nationality born outside Hong Kong are eligible for right of abode only if, at the time of their birth, at least one of their parents belongs to the category listed in Article 24(2)(1) or Article 24(2)(2) of the Basic Law. That is to say, generally speaking, he or she had been born in Hong Kong or had ordinarily resided in Hong Kong for seven years;

- Secondly, the requirement under Article 22(4) of the Basic Law that Mainland residents must apply for approval from the Mainland authorities for entry into the HKSAR does apply to persons of Chinese nationality born outside Hong Kong of Hong Kong permanent residents.

7. The organisations that have responded to the Panel's invitation say that – by seeking an interpretation by the NPCSC – a non-judicial body – we have in some way undermined the rule of law. We understand why they should consider that this is so. But we profoundly disagree with their assessment. We have repeatedly affirmed – in the report and in other contexts – that the rule of law is the fundamental basis for the protection of human rights. We are firmly of the view that the actions we took were entirely consistent with the rule of law and we remain, as we always have been, wholly committed to the maintenance of the rule of the law and to the principles on which it is based.

Judicial independence

8. It has also been asserted that the interpretation has removed the CFA's power of final adjudication and undermines judicial independence. But the NPCSC's interpretation did no such thing. Indeed, it made it abundantly clear that the CFA decision in regard to the cases in hand was and remains final. The Court's adjudication was not overturned. And the rights of the litigants were not affected. Thus, the interpretation does not interfere with the independence of Hong Kong courts in deciding cases in accordance with the law. Rather, as in certain civil law jurisdictions, it provides the Courts with an authoritative legislative statement of what the relevant lawmaking body (in this case, the National People's Congress) intended when it framed a particular law or provision within a law. It is then incumbent on the Courts – in accordance with the rule of law – to determine cases in accordance with that statement.

9. The concern has also been expressed that the decision to seek an interpretation bodes ill for the rule of law as it indicates that Government may seek such interpretations whenever a CFA decision is not to its liking. However, as our analysis in paragraphs 3 to 6 makes clear, the decision to seek an interpretation was taken in accordance with the law and was necessary in order to clarify the legislative intent of Articles 22(4) and 24 (2)(3) of the Basic Law and to address an objective problem of crisis proportions. The CE submitted his report to the State Council under BL43 and BL48(2). The report set out the problems he had encountered in the implementation of the Basic Law and requested assistance for seeking the NPCSC's interpretation to resolve the problems. The SAR Government has pledged that it will not seek another interpretation by the NPCSC save in highly exceptional circumstances.

Ouster clauses

10. Such clauses sometimes provide that particular administrative decisions shall be final and cannot be challenged in the courts. These clauses are themselves subject to challenge in the courts, and the law relating to them is complex. The Hong Kong Bar Association has asked whether the existence of these clauses indicate a need to qualify the statement – in paragraph 29(a) of the report – that, under the rule of law, an administrative decision must be capable of successful challenge before the courts. The position is that the right to a fair and public hearing by a competent, independent and impartial tribunal, guaranteed in Article 14 of the ICCPR, is fully protected in domestic law by Article 10 of the Bill of Rights Ordinance. In addition, the Ombudsman has the power to investigate alleged maladministration despite the existence of ouster clauses (see paragraph 29 below).

Legitimacy of the Provisional Legislative Council

11. The Hong Kong Christian Institute has called into question the legitimacy of the Provisional Legislative Council. We have addressed this issue in paragraphs 455 to 457 of the report to which we will only add that – since the report was finalised – the CFA has also confirmed the constitutional validity of the Provisional Legislative Council's establishment.

Police actions and the Rule of Law

12. In March 1999, the Police applied to the Magistrate's Court for a warrant to raid six service centres of the Macau Jockey Club which were suspected of conducting illegal gambling operations.

The Magistrate rejected the application. Subsequently, the Police conducted the raids on the strength of a warrant signed by a Superintendent of Police in accordance with section 23 of the Gambling Ordinance (Chapter 148)[2]. The Human Rights Monitor cites this as an act of disregard for the judgement of the Courts.

13. The perception is a natural one. But it derives from incomplete information. There were two hearings before the magistrate. At the first, on 16 December 1998, the magistrate gave two reasons for refusing the applications. In essence they were:

(a) Given that the Gambling Ordinance empowers police officers of the rank of superintendent and above to authorise the entry and search of gambling establishments, and certain presumptions arise in respect of activities conducted in those premises, a general authorization under section 50(7) of the Police Force Ordinance was inappropriate in dealing with gambling activities. Indeed, at the second hearing (on 22 December 1998), the magistrate asked why the Police did not consider using the Gambling Ordinance; and

(b) The magistrate was uncertain whether the alleged gambling activities, which had an extra-territorial element, fell within the offence provisions. The Department of Justice took the view that this gave rise to an issue of law which realistically would need to be pursued after the raids had occurred and in light of such evidence as was obtained.

14. The fact that the magistrate was not prepared to issue a warrant under the Police Force Ordinance was no legal impediment to the issue by a police superintendent of an authorization under the Gambling Ordinance. Moreover, in view of the comment made by the magistrate, there can be no basis for suggesting that, once the police formed the required reasonable suspicion as to the use of the premises in question, they were acting in a manner that was in any sense arbitrary.

Article 2: Equal enjoyment of the rights recognised in the Covenant

Education of judges

15. Hong Kong's Judiciary operates within the international world of the common law and follows developments in all areas of law – including human rights law – in other common law jurisdictions.

16. The Judicial Studies Board provides continuing education and training for judges. Human rights law is one of many new areas that are emphasised. In paragraph 17 and Appendix 6 of the previous report, we informed the Committee of the human rights seminars that Hong Kong judges had attended between 1992 and 1995. Sine then, judges continued to participate in visits and human rights seminars both locally and overseas. In 1996, a Judge of the District Court visited the Industrial Tribunals and Equal Opportunities Commission in the United Kingdom and a High Court Judge attended the International Bar Association Human Rights Seminar in Berlin. In the same year, ten Judges and Judicial Officers attended a Bill of Rights Seminar in Hong Kong.

17. In 1997, members of the Judiciary attended a Conference on Hong Kong Equal Opportunities Law in International and Comparative Perspective in Hong Kong and a Seminar on

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[2] The Gambling Ordinance empowers police officers of the rank of superintendent and above to authorise the entry and search of gambling establishments.

Women, Human Rights, Culture and Tradition in London. In 1998, the Judicial Studies Board Tamorganised a series of talks for judges on Administrative Law. In June, Judges and Judicial Officers participated in a Conference on Worldwide Application of the ICCPR organised bv the International Bar Association. In September the same year, over 100 Judges and Judicia! Officers attended a lecture on "the development of judicial review and human rights protection within the separation of powers" delivered by Lord Chancellor of UK. Later in November, a District Court Judge attended a Seminar on Hong Kong and the Convention on the Elimination of All Forms of Discrimination against Women.

18. In April 1999, a High Court Judge chaired a panel discussion entitled "Augusto Pinochet and the pursuit of justice violations of human rights – implications for international law and Hong Kong". In July 1999, a Permanent Judge of the Court of Final Appeal attended the Fifth World Congress on Constitutionalism, Universalism and Democracy in Rotterdam. We are planning a seminar on Equal Opportunities for Judges and Judicial Officers in March 2000.

The Hong Kong Bill of Rights Ordinance (BORO)

19. 'Justice' has raised three points in relation to the explanation of our position in paragraphs 9 to 18 of the report. These are:

(a) **Paragraph 17 of the report**. Justice has asked us to clarify this paragraph. Essentially, the paragraph was intended to explain our view that the decision in *Tam v. Wu* – that the 1997 Amendment Ordinance was intended to repeal – was increasingly academic in practical terms. Therefore, the Amendment Ordinance was substantively redundant;

(b) **Legal uncertainty**. The uncertainties are analyzed in paragraph 16 of the report. 'Justice' considers that they could readily have been disposed of by the Courts. But the uncertainties were very real and, as we have also argued, the Ordinance was, in any case, substantively redundant; and

(c) **Effect of Article 39 of the Basic Law**. 'Justice' calls on Government to state its understanding of the effect of Article 39 in relation to actions as between non-Government actors. We consider this to be a matter for the Courts to decide in the determination of specific cases.

Human Rights Commission

20. Some of the comments received reiterate calls for a Human Rights Commission. Paragraphs 21 and 22 of the report explain our position – with which the Panel is well acquainted – to the Human Rights Committee. We have nothing to add to what we have said there

Complaints against the Police

21. Contributors say that the developments described in paragraph 51 of the report do not address the concern that the investigation of complaints against the Police remains in the charge of the Police. Our objections to placing the investigation of such complaints in the hands of non-Police personnel are based on practical considerations. One is that – in addition tc its investigative role – the Complaints Against the Police Office (CAPO) has a 'prophylactic' function in relation to incidents or practices that could give rise to complaints. That is, it analyses and monitors the trend of complaints and identifies problems or defects in Police administrative procedures and operational methods. Non-Police personnel cannot fulfil this role effectively because they do not have adequate knowledge or experience of Police work. An additional consideration is that, because it remains staffed by Police officers, CAPO can more readily and effectively liaise with Police formations with

a view to preventing the behaviour that engenders complaints and ensuring accountability at the supervisory level. We also believe that non-Police personnel would not be able to investigate complaints as efficiently and effectively as CAPO does because:

(a) Complaints against the Police often involve alleged breaches of criminal law or of Police discipline or procedures. Non-Police personnel would not have the necessary expertise, knowledge and skills to investigate matters of that nature; and

(b) Most complaints involve allegations of criminal offences and, on average, 34.8 per cent of the complaints relate to cases that are sub-judice at the time they are made. In the circumstances, it would be inappropriate for non-Police personnel to undertake the investigations.

22. The Democratic Party has said that the IPCC does not have any actual powers. To illustrate the point, it cites the complaint against Police handling of demonstration at the 30 June 1997 reunification ceremony. But – as we point out in paragraph 382 of our report – the IPCC disputed CAPO's findings in this case and the Commissioner of Police readily accepted the Council's recommendations. This clearly demonstrates that the Council is both independent and impartial and that its role in the complaints system is significant.

23. The Party also cites the low participation rate of IPCC Members under the IPCC Observers Scheme. We accept that the participation rate is not as high as we would like it to be and that we need to strengthen it. But, to put the question into perspective, the Observers Scheme is only one of the means whereby IPCC Members monitor CAPO investigations. For example, when examining investigation reports, they can ask CAPO to clarify areas of doubt. In discharging their duties, they can interview witnesses. And – with effect from 1 September 1999 – we have expanded the Observers Scheme by appointing 29 retired IPCC Members and other community leaders – such as the District Fight Crime Committee Chairmen – as Lay Observers of CAPO investigations.

24. The Human Rights Monitor considers that the rate of substantiation of complaints against Police is low and that the rate of withdrawals of such complaints is high. They consider that this casts doubt on the credibility and effectiveness of the system.

25. The assertion appears to envisage the existence of universally accepted parameters against which complaints systems might be judged. In other words, the Monitor appears to assume that such systems must yield an agreed percentile range of substantiations, a given percentile range of withdrawals, and so forth. There are, of course, no such parameters. Certainly, in the search for indicators of credibility, we cannot look to substantiation rates for the excellent reason that, like everyone else, Police officers have the right to be presumed innocent unless there is adequate reliable evidence to the contrary.

26. Nor, for much the same reason, are withdrawal rates of much help in that regard. The view that they might be depends on the assumption that complaints are withdrawn under pressure. The presumption of innocence aside, the Hong Kong system requires investigators to ascertain from complainants why they propose withdrawing their complaints. When an investigator considers that a complaint that is being withdrawn is likely to be substantiated, he will advise the complainant that, notwithstanding the withdrawal, the enquiry may continue. The reasons that complainants most commonly cited for withdrawing their complaints are:

(a) The complaint is minor in nature and was made in the heat of emotion;

(b) Their main purpose in making the complaint was solely to bring the matter to the attention of a senior Police officer; or

(c) The complainant does not want to spend time assisting in the investigation.

The Ombudsman's office

27. On page 11 of its submission, the Human Rights Monitor expresses doubt as to the independence of the Office of the Ombudsman. The doubts relate to provisions in the Ombudsman Ordinance (Chapter 397) that, the Monitor says, prevent the Ombudsman from functioning as an independent and effective human rights commission. Specifically, the Monitor says that the Ordinance contains "broad and vague exceptions" that limit the Ombudsman's jurisdiction. For example, the Ordinance requires the Ombudsman to maintain secrecy regarding any investigation or complaint. In the Monitor's view, that requirement is contrary to the Paris Principles.

28. To address the last point first, the Paris principles (as the Committee is aware) relate to the establishment, scope and functioning of national human rights commissions. As such, they are irrelevant to a discussion of the Office of the Ombudsman, which is not – and was never intended to be – a Human Rights Commission. Rather, its role is as explained in paragraph 29 below.

29. **Role**. The role of the Ombudsman is to strengthen and supplement existing channels for the redress of grievances, not to replace any of them. Chapter 397 gives her full discretion to determine whether to undertake or continue with an investigation. Section 7(2) of the Ordinance provides that the powers conferred on the Ombudsman "shall be exercised in accordance with the provisions of this Ordinance". But such powers may be exercised "notwithstanding any provision in any law to the effect that any decision shall be final, or that no appeal shall lie in respect thereof, or that no proceeding or decision of the organisation whose decision it is shall be challenged, reviewed, quashed, or called into question." Thus, the Ombudsman has power to investigate proceedings and decisions that are 'protected' by 'ouster clauses' (paragraph 10 above).

30. **Independence**. The Ombudsman is independent of the Executive. Her mandate is to investigate grievances arising from administrative decisions, recommendations, acts or omissions. She reports directly to the Chief Executive. Where she considers that a serious irregularity or injustice has taken place, she may present a special report to the CE, which, in accordance with the Ombudsman Ordinance, shall be laid before the Legislative Council. The Ombudsman's jurisdiction extends to practically all Government departments, except the Police Force and the Independent Commission Against Corruption, which are subject to scrutiny by dedicated monitoring bodies (paragraphs 44 and 45 in Part I of the report and 49 to 51 in Part II). But the Ombudsman does have jurisdiction over them in respect of their exercise of administrative functions in relation to the Code on Access to Information.

31. **Secrecy**. Section 15 of the Ombudsman Ordinance requires the Ombudsman and her staff to maintain secrecy in respect of all matters arising from any investigations or complaints made to her Office. The purpose is to protect the privacy and interests of the complainants whose trust and concomitant sense of personal security is essential to the functioning of the system. We consider the desirability of this provision to be self-evident.

Legal aid

32. The Democratic Party, among others, has urged the Government to make the Legal Aid Department independent of the Government. They say that the Department takes an inordinately

long time to process applications relating to personal injuries. divorce, and compensation claims in labour cases. They also consider that legal aid should be provided for cases before the Coroner.

33. Taking these points seriatim:

(a) **Independence**. Our view is that the legal aid system is fair and independent. The Legal Aid Ordinance provides that the Director of Legal Aid must consider every case independently. Any persons whose applications have been refused or who feel aggrieved for any reasons can appeal to the Judiciary. Recently, the Legal Aid Services Council's recommended the establishment of an independent legal aid authority. We examined its proposals in the light – among other things – of overseas experience. We concluded that, while a legal aid authority might help create a perception of independence, it would not – in practice – be a step forward. Legal aid funding needs to open-ended in order to ensure that no one is deprived of a fair hearing owing to a lack of means. The present system ensures exactly that. Experience elsewhere is that, once legal aid becomes financially independent of Government, governments are no longer willing to underwrite open-ended funding and the newly 'independent' bodies are then 'cash-capped' to the potential detriment of clients. We too would be obliged to follow that route for the very good reason that no responsible Government can be expected to give 'carte blanche' to an institution outside the disciplines of public sector spending controls. Our prime objective is to ensure that legal aid services are run efficiently and that legal aid recipients receive the assistance they need. The present system with an open-ended budget is well placed to ensure that;

(b) **Processing times**. Recent statistics show that 97 per cent of applications relating to divorce and 87 per cent of those relating to labour compensation claims were processed in three months. This exceeds the Department's pledge to process 80 per cent of applications in that time frame. Applications relating to personal injuries take longer because the Department must obtain medical records and documentation on the degree of injury. Currently, the Department can only process 65 per cent of the applications within three months. It is working towards improving on this;

(c) **Legal aid for cases before the Coroner's court**. We are introducing a Bill to implement the proposals of the 1997 Review of the Legal Aid Policies. Among other things, the Bill seeks to empower the Director of Legal Aid to grant legal aid to the next of kin of a deceased person in cases that involve significant public concern, irrespective of whether the case involves compensation claims. It will also empower the Duty Lawyer Service to provide legal aid to persons who are likely to face a reasonable chance of criminal prosecution that would lead to a jail sentence or loss of livelihood as a result of giving evidence at Coroner's inquests. This will pay for a lawyer to attend the whole inquest to protect the interests of such persons and to cross-examine witnesses.

34. There is further discussion of legal aid in paragraphs 93 and 94 below in relation to Article 14.

Adaptation of laws

35. Justice says that the report omits the reasons for opposition to the amendment to section 66 of the Interpretation of Clauses Ordinance (Chapter 1). We thought – and still do – that paragraph 29 of the report (Part 1) captured the essence of the objections in stating that commentators considered that the amendment had compromised the principle of equality before the law, which is one of the key principles underlying the Rule of Law.

36. The aim of the adaptation of laws exercise is merely to ensure that Hong Kong's laws are consistent with the Basic Law and with Hong Kong's status as a Special Administrative Region of the People's Republic of China. Where any inconsistencies are discovered in the course of the exercise, the next step is to ensure the proper adaptation of the laws in question. The adaptation of section 66 of the Interpretation of Clauses Ordinance (Cap 1) was such a case. It did no more than preserve and adapt a principle that applies in nearly all common law jurisdictions concerning the binding effect of legislation. The view that (the adapted) section 66 is inconsistent with the Basic Law is, we believe, misconceived.

Article 3: Equal rights of men and women

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

37. Contributors have urged us to act on the recommendation of the Committee on the Elimination of Discrimination against Women that we establish a 'central mechanism on women'. We are studying all the Committee's recommendations in detail, including that concerning the 'mechanism'.

Sex Discrimination Ordinance (SDO)

38. The Equal Opportunities Commission (EOC) has proposed amendments to the SDO and the Disability Discrimination Ordinance. We are examining the proposals in detail and have asked the EOC to provide further information. However, some of the proposals have wide policy and legal implications and we will need more time to examine them.

Equal rights in education

39. Commentators have expressed concern about the recent reports regarding possible discrimination in the Secondary School Places Allocation System. The system was designed in accordance with a number of educational principles with a view to the overall interests of our students. It was not intended to be discriminatory and the suggestion that it may be so in practice is of concern to us too. We are studying the EOC's 'Formal Investigation Report' in detail and will review the allocation system in the light of its recommendations. Meanwhile, the Government's policy is that there should be no discrimination between students on the basis of sex. The syllabuses that the Education Department recommends for use in schools are not intended to be gender specific.

40. Concern has also been expressed about the fact that two subjects – Design and Technology and Home Economics – appear in practice to be streamed by gender. To the extent that this is so, the phenomenon is not a result of Government policy. Rather, it is a practice of individual schools, influenced by traditional thinking. Government regularly reminds schools that male and female students should have equal access to these – and, indeed, all – subjects.

EOC to be subject to the jurisdiction of the Ombudsman

41. The EOC has said that it wishes to be subject to the Ombudsman's jurisdiction. We have no objection to this. But the EOC is an independent statutory body and we will suggest to the Ombudsman that she discuss this with the Commission direct.

Article 4: Public emergencies

42. With reference to paragraphs 95 to 97 of the report, the Committee has asked how Article 18 of the Basic Law is compatible with Article 4. And how would non-derogable rights be protected in the case of a state of emergency? In this context, Justice and the Frontier are unconvinced by our assurance – in paragraph 91 of the report – that, in an emergency, the provisions of Article 18 of the Basic Law would have to be read with those in Article 39, so that derogating measures may be taken only to the extent strictly required by the exigencies of the situation. The Hong Kong Journalists Association (HKJA) considers that there should be legislative checks on the ability of the Executive to proclaim an emergency. And the Frontier recommends that the Emergency Regulations Ordinance be amended in order to bring it into line with Article 4 of the ICCPR. In responding to these comments, it is necessary to consider separately the power of the HKSARG to make emergency regulations, and the power of the CPG to apply national laws to the SAR.

Emergency regulations

43. The Emergency Regulations Ordinance empowers the Chief Executive in Council, on any occasion which he considers to be an occasion of emergency or public danger, to make regulations that he considers desirable in the public interest. Although that power appears to be very wide, it is subject to Article 39 of the Basic Law, which entrenches the ICCPR as applied to Hong Kong. Thus, any Regulations that could be made in emergencies under the Emergency Regulations Ordinance would have to be consistent with the provisions of Article 4 of the Covenant. That is, measures derogating from Covenant rights could only be taken to the extent strictly required by the exigencies of the situation. And no derogations could be made from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18. Such regulations would be subsidiary legislation and therefore subject to vetting by the Legislative Council.

National laws

44. Given the power to make local regulations to deal with an emergency, it is unlikely that the CPG will need to rely on Article 18(4) and apply relevant national laws to the SAR, save in extreme circumstances. Moreover, as is stated in paragraph 91 of the Report, Article 18(4) would need to be read with Article 39. The Basic Law must be read as a whole, and individual Articles not interpreted in isolation from other relevant Articles.

Article 6: Right to life

Complaints involving disciplined services other than the Police

45. The Bar Association says that paragraph 46 of the report is not wholly accurate in view of "the limited role of the visiting justices" and the lack of an independent prison inspectorate. We do not accept that the role of the visiting justices is limited. Each year, on average, the justices receive over 200 complaints from inmates of penal institutions: a figure that suggests that prisoners regard the system as effective and have confidence in it. But important though their role is, the justices comprise just one part of the overall system for handling prisoners' complaints. Other avenues of appeal include the Chief Executive, members of the Legislative Council, the Ombudsman and the Correctional Service Department's Complaints Investigation Unit.

Deaths in Police custody

46. The Bar Association has said that the information in paragraphs 98 to 102 of the report needs updating. We do so in the following paragraphs.

47. Between 1 July 1998 and 31 August 1999, there were five deaths in Police custody: one in 1998, the other four in 1999. In one case, the person concerned was found to have died by suicide. In another, the jury returned an open verdict, with heroin intoxication being the cause of death. In one of the three remaining cases, the Coroner has ordered a death inquest to be held in early November. Investigations into the two other cases are in progress.

48. In paragraph 100 of the report, we said that four investigations into such deaths had yet to be concluded. In one case the person concerned was found to have died of unlawful killing. A police officer was convicted of manslaughter and committed to a Psychiatric Centre for an unspecified period. In two of the cases the deceased were found to have died by suicide. In the remaining case, there was a verdict of death by accident.

49. The Human Rights Monitor considers that Coroner's inquests into deaths in custody are compromised by the fact that the related investigations are conducted by the Police. It considers that those investigations should be conducted by an independent body. We do not share that view. Investigations into such deaths in Police custody are not conducted by the Police station involved in the case but by a separate team at a more senior – for example, the Regional – level. If necessary, the case may be investigated by a team from a separate Region. This helps to ensure the impartiality of the investigation.

50. If the Coroner considers it necessary, he can seek clarification or additional information relating to the death report submitted by the Police. The Police must then co-operate with the Coroner by virtue of section 10(ga) of the Police Force Ordinance (Chapter 232) which requires them to assist coroners to discharge their duties and exercise their powers under the Coroners Ordinance (Chapter 504). Additionally, section 12 of the Coroners Ordinance enables a coroner to obtain the opinions of independent experts. Section 12 of the Coroners Ordinance provides that, if it appears to a coroner that a person is capable of giving material evidence at a death inquest, the coroner may issue a summons to require that person to appear before him to testify. Moreover, section 15(3) of the Coroners Ordinance empowers the Coroner to request the Commissioner of Police to take such measures as are necessary to ensure that investigations into deaths in police custody are conducted independently and impartially. There is no evidence to suggest that they are not.

Article 7: No torture or inhuman treatment and no experimentation without consent

51. Some 13 overstayers complained to the Legislative Council about their treatment by Immigration staff during their detention on 30 and 31 March this year. The Immigration Department, the Police and the Correctional Services Department had investigated the complaint. Their findings – endorsed by the Secretary for Security – were submitted to the Legislative Council on 5 August. Of the 13, two declined to be interviewed; three indicated during interview that they had no complaint to make; and one indicated that his case was minor and that he did not wish to pursue it. The remaining seven made statements of complaint.

52. The departments found the complaints unsubstantiated with the exception that, for one of the two days the complainants were detained, toothpaste and toothbrushes were not available at the

Mau Tau Kok Detention Centre. This was due to a sudden increase in the number of detainees. Measures have been taken to ensure that, in future, such daily necessities will be replenished fully and in a timely fashion.

53. The complaint that has engendered greatest concern is that the detainees were subjected to a strip search. This was the case: as a matter of established procedures all detainees are subject to a strip search on arrival at the detention centre to ensure that they are not carrying concealed weapons. The search is an essential measure for the safety of inmates and staff.

Records of alleged ill treatment by the Police

54. Referring to paragraph 112 of the report, the Bar Association says that the Police and the Department of Justice should be able to keep a record of cases where the courts rule on claims of ill treatment of prisoners in trials within trials (*voire dires*). Technically, it would be possible to record the number of times courts are asked to make such rulings and the rulings they subsequently make. But – for the reasons below – the statistics so obtained would be misleading in that they could give a false, and exaggerated, impression of the extent to which the courts viewed Police actions as incidents of impropriety.

55. When courts rule on the admissibility of confession statements after voire dire proceedings, they are not required in law to give their reasons for either admitting the statements into evidence or for excluding them. In the event of exclusion, most courts confine themselves to observing that the statement will not be admitted because the prosecution has not proved voluntariness beyond reasonable doubt. Detailed reasons for a ruling are the exception and not the rule. On the rare occasions when detailed reasons are given, it is not usual for a court to indicate that it accepts the allegations of Police impropriety. Most commonly, it will simply indicate that it has doubts about the veracity of the police version and/or that – as there may be some truth in the allegations of the accused – it would not be safe to admit the confession statement.

56. On the (also rare) occasions when a court indicates that it either accepts an allegation of impropriety, or believes that it may be true, the judge, the prosecutor, or the defence counsel will routinely ask police to pursue the matter. Normally, however, the Complaints Against the Police Office (CAPO) will already be aware of the matter in view of pre-trial complaints lodged with it by the accused or his lawyers. CAPO keeps a record of both the pre-trial complaints and the referrals from the courts but does not distinguish them for statistical purposes. The numbers are:

Year	**No. of assault complaints**
1996	72
1997	58
1998	81
1999 (to 30 June)	138

Prosecution and disciplinary measures for Police Officers

57. Referring to paragraphs 109 to 111 of the report, the Monitor says (on page 16 of its submission) that our summary of events is inadequate. It also maintains that the Police officers involved in the case should have been charged under the Crimes (Torture) Ordinance. This is an instance where we must agree to disagree. We believe that our summary encapsulated all the essential facts and presented a balanced description of the events in question. We also abide by our analysis and explanation – in paragraphs 110 to 111 of the report – as to why it was appropriate to bring the prosecution under the Offences Against the Person Ordinance and not the Crimes (Torture) Ordinance.

Article 9: Liberty and security of the person

Prosecution in Mainland China for crimes committed in Hong Kong and negotiations on rendition arrangements

58. There has been much discussion of two high profile cases that occurred in late 1998 and in 1999. In both cases, the defendants were arrested, tried and executed in Mainland China. In one case, the defendants – who included Hong Kong residents – had committed crimes on the Mainland as well as in Hong Kong. The Mainland Courts exercised jurisdiction over the case on the basis that the offences either took place in – or were planned in – the Mainland. In the other case, the defendant was a Mainland resident who was prosecuted for the murder of five people in Hong Kong, though preparatory acts and the disposal of the proceeds of the crime took place on the Mainland. Some commentators have questioned whether the Mainland court had jurisdiction to hear the case. That was a question for the Mainland court to determine under Mainland laws. Had the suspects been arrested in Hong Kong, the Hong Kong courts would have had jurisdiction to try them. Concurrent jurisdiction is common throughout the world.

59. Some commentators believe we should have sought the extradition of the accused in this case. But there could be no question of that because no 'extradition' arrangements are in place between the Mainland and the HKSAR. Thus, there was no legal basis on which the SAR Government could have sought their return.

60. Amnesty International considers that these cases entail Articles 2, 6 and 7 of the Covenant rather than Article 9. Specifically:

(a) They invoke Article 2 on the ground that Mainland residents who commit crimes in Hong Kong may be subject to the Mainland Criminal Law in addition to the laws of Hong Kong. Non-Mainlanders who commit crimes in Hong Kong are not. However, if that is the true position, it would merely reflect the fact that some persons in Hong Kong come from jurisdictions whose laws have extra-territorial application is outside the control of the HKSAR Government and would not entail a breach of Article 2 of the Covenant;

(b) Article 6 is invoked because the persons concerned were executed. But they were executed in accordance with the laws of the jurisdiction in which they were tried. The position in Hong Kong (where there is no death penalty) was unaffected; and

(c) Article 7 is invoked, presumably because Amnesty believe the death penalty constitutes cruel or inhuman treatment or punishment. Again, the matter was determined in accordance with the laws of the jurisdiction in which the persons concerned were convicted and tried.

Article 10: Persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person

Prison Rules

61. Referring to paragraph 180 of the report, the Bar Association says that the Secretary for Security cannot be regarded as an "independent appellate body" for prisoners aggrieved by decisions of the Commissioner of Correctional Services. The background is that, before the Rules were changed in 1996, an aggrieved prisoner could only appeal to the Commissioner of Correctional

Services. The 1996 Rules provide the prisoner with a further appeal channel, namely the Secretary for Security who must consider each case impartially. The Secretary is 'independent' in the sense that the Correctional Services Department and its staff are her subordinates and she is not beholden to them either on a personal level or as a matter of institutional culture.

Rehabilitation of offenders

62. The Bar Association asks whether the provisions of the Rehabilitation of Offenders Ordinance (Chapter 297) discriminate against affluent offenders as the amount of a fine is a relevant factor in considering whether a person can benefit under the Ordinance. The Association also asks whether affluent offenders may be fined more heavily than others for similar offences. The level of fine is not the only consideration in the application of the Ordinance: the provisions also cover offenders who have been sentenced to an imprisonment for three months or less. And, in practice, the system of rehabilitation of offenders under the Ordinance has worked well for the 13 years since its enactment. The upper limits (length of imprisonment and level of fines) were endorsed by the Legislative Council after thorough discussion. They are not intended to discriminate against affluent offenders, nor are they arbitrary. While it is true that the Courts may take account of an offender's means when setting the level of fines, they also take into account other – more important – factors such as the severity of the offence involved; the degree of damage inflicted on the victim or the extent of deterrence that the Courts intend to reflect in the sentences they impose. The situation envisaged by the Association is theoretically possible but – to the best of our knowledge – it has not proven so in practice. Having said that, we will carefully consider the Association's concerns.

The JP system

63. The Bar Association says that paragraph 203 of our report (respecting the work of Justices of the Peace) would be more credible if we had supplied statistics relating to action taken. The point is well taken. Between 1 April 1998 and 31 March 1999, Visiting Justices have initiated investigation action into 90 cases (about 35 per cent of the total number of complaints). They did so on their own initiative and without referring the complaints for follow-up by the institutions concerned. The Justices personally inquired into each complaint. This entailed such things as seeking background information from prison staff and examining relevant records and documents.

64. The Bar Association and the Human Rights Monitor share concerns as to whether prisoners are able to see JP's out of the hearing of CSD staff. The standard arrangement[3] has, indeed, been that a CSD officer not below the rank of Chief Officer normally accompanies the Visiting Justices on their inspections and brings before them any prisoner who wishes to see them. The intention has not been to deter prisoners from making reports or complaints or to intervene in discussions between Justices and prisoners. Rather, the purpose is to brief the Justices, to answer their questions, and to ensure the security of the prison, the prisoners and the Justices themselves. However, Justices may certainly speak to prisoners in private if they so wish. Places suitable for that purpose (rooms in sight – but not in the hearing – of prison staff), are available in all CSD institutions.

65. The Monitor says that JPs have no specific training or experience in prison matters and, therefore, are ill prepared to delve beneath the surface when investigating prison conditions. And the system as a whole suffers from a serious lack of continuity. We are aware that all systems can

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[3] Under Prison Rule 117.

usefully be improved and recently reviewed the JP system in consultation with the Justices themselves. On the basis of our findings, we are implementing several changes to improve the system. One is to ensure that, in future, Justices will be able to visit particular institutions (or types of institutions) of their choice on a more regular basis to enable them to monitor progress and take follow-up on complaints and issues raised during previous visits. Currently, we issue a quarterly newsletter to inform JPs about the JP system and to keep them abreast of developments relating to their work as visiting justices. Annual briefings are organised for newly-appointed JPs. Seminars are held for existing JPs on a need basis. Together, these things help to ensure that JPs are well informed and properly prepared for the duties that are required.

Prison (Amendment) Rules 1997

66. The Bar Association has asked whether CSD staff may read letters addressed to prisoner's legal advisers. In normal circumstances, they may not. Rule 47B(2) specifically prohibits this except where staff have reasonable grounds for believing that a letter is not a bona fide communication for the purpose of seeking or giving legal advice.

Prison Rule 68B

67. Prison Rules 68B is an administrative measure that permits prison management to remove a prisoner from normal association for the maintenance of good order or discipline, or in the interests of the prisoner himself. Where, for these reasons, the Superintendent has reasonable grounds for believing it is desirable that a prisoner should not associate with other prisoners, he may order the removal of that prisoner from association for a period of not more than 72 hours. No prisoner shall be removed from association unless the Medical Officer has certified that the prisoner is fit for removal. The Superintendent will notify the prisoner of the reason for the removal and inform him of his right to make representations against it. The Commissioner of Correctional Services shall appoint for each prison a Board of Review consisting of the Superintendent, the Medical Officer and such other suitable officer as the Commissioner may select, to keep under review the progress of all prisoners removed from association and to make recommendations as to their suitability (including medical and psychological fitness) for continued removal or for return to association. Taking into account the Board's recommendation, the Commissioner may order continued removal for up to one month.

68. It is important to note that – in the context of Rule 68B – 'removal' means removal of a prisoner from normal association. It is not a form of punishment: prisoners 'removed' under the Rule may work in association with others. And, to put the issue in perspective, as at 30 September 1999 only 11 out of the 11,443 prisoners then in custody were removed from association. All were provided with channels to make representations to the prison management or to the Commissioner. Additionally, like all prisoners, they were entitled to lodge complaints with the Visiting Justices and the other channels described in paragraphs 199 to 208 of the report.

69. On page 19 of its submission, the Human Rights Monitor cites a specific complaint about the application of Rule 68B and expresses concerns as to the potential for its abuse. The Correctional Services Department has repeatedly asked the Monitor for details of that case since 1997 but to no avail. In any case, we believe that there are adequate safeguards to protect prisoners who file complaints. Prison staff must abide by the Prison Rules in their treatment of prisoners and in the operation of penal institutions. In particular, Rule 228(2) provides that visiting Justices of Peace "shall pay special attention to prisoners, or residents of hostels, in hospitals and prisoners in separate confinement." Prison staff must take Visiting Justices to inspect prisoners removed from normal association and hear their complaints if any. Officers who contravene the Rules, or otherwise act in breach of their duties, are subject to disciplinary action.

Complaints against the Immigration Department

70. On pages 18 and 19 of its submission, the Human Rights Monitor says that – in the course of 1999 – it has learned of numerous and consistent abuses by officers of the Immigration Department against right of abode claimants and other minorities. It urges the Government to introduce independent and effective mechanism to prevent and investigate abuses by immigration officers.

71. All complaints against members of the Immigration Service received by the Immigration Department are investigated by the Department's Management Audit Division. The investigation results are reviewed by the Complaints Review Working Party headed by the Assistant Director (Administration and Planning). Where complaints against members of the Immigration Service are substantiated, the Director of Immigration takes disciplinary actions against the officers concerned in accordance with the Immigration Service Ordinance (Chapter 331) or the Civil Service Regulations as appropriate. If a member of the Immigration Service commits a criminal offence, the case is reported to the Police for investigation in the first instance.

72. There are other channels for complaint against members of the Immigration Service. Those channels include the Ombudsman, Legislative Councillors, the Chief Executive, visiting JPs, and the courts.

73. The table below demonstrates that the number of complaints received by the Immigration Department of physical abuse by members of the Immigration Service has remained steady since 1996. At the same time, the number of complaints of other forms of abuse has been falling.

	1996	1997	1998	1999 (as at June)
Complaints of physical abuse	5	6	6	2
Result of investigation				
– Substantiated	0	0	0	0
– Unsubstantiated	5	6	6	2
Complaints against other forms of abuse	286	220	211	94
– Standard of service	204	138	146	56
– Procedure/policy	60	39	24	23
– Both	22	43	41	15
Result of investigation				
– Justified	72	54	46	16
– Unjustified	143	125	124	59
– Undetermined	71	41	41	14
– Not finalised	0	0	0	5

Note: The figures do not include complaints against members of the Immigration Service received by other parties.

Death of a child in the custody of the Social Welfare Department

74. On page 21 of its submission, the Monitor cites the death of a 14-year old boy who committed suicide while in custody in a home operated by the Social Welfare Department. It asserts

that the incident was a violation of the Torture Convention and therefore of Article 7 of the Covenant. It urges the Government to commission an investigation by an independent authority and to review the Department's training programme and procedures. For the reasons below, we do not consider that this is warranted.

75. The death of the boy, which occurred in April 1997, was a tragedy that is deeply regretted. But it was not, as some commentators have suggested, symptomatic of deep-seated, or endemic, failures within the system. Lest this assertion seem complacent, we must explain it reflects the fact that this was the first time an event of this kind had occurred in any of the Social Welfare Department's correctional homes. Notwithstanding that, the incident came as a severe shock to all concerned and, on the basis of recommendations made by the Coroner's Court (which brought in a verdict of suicide), the Social Welfare Department has put into effect measures for improving the management and operation of the homes and for the better safety of persons detained in them.

76. There are strict guidelines governing the use of segregation in the Social Welfare Department's correctional homes and the periods of segregation to be applied in particular cases. All such homes are inspected every month by Justices of the Peace. The Social Welfare Department is required to report on any follow-up action taken in the light of such visits.

Article 12: Liberty of movement

77. Contributors have raised several issues under this head. These are addressed in the following paragraphs.

Right of abode and referral to the NPCSC

78. These issues are discussed in paragraphs 1 to 10 above in relation to the Rule of Law.

Removal of legal aid applicants

79. On 21 July 1999, the Director of Immigration exercised his power under the Immigration Ordinance to remove two illegal immigrants after they had applied for legal aid to establish their claim – under Article 24(2)(3) of the Basic Law – to have the right of abode. Justice adduces the case as an infringement of the principle that persons who have the right of abode in Hong Kong cannot be deported or removed from Hong Kong. They and others also consider that it is 'evidence' of a lack of respect for the Judiciary on the part of the Government.

80. The guiding principle in effecting such removals is the need to balance the protection of civil liberties and the need to maintain immigration controls. With those things in view, the practice is that:

(a) The Director of Immigration will suspend a removal if court proceedings have commenced, or if he knows that court proceedings are about to commence;

(b) A removal will be temporarily withheld if legal aid has already been granted to the detainee; and

(c) The Director of Immigration will notify the Director of Legal Aid (DLA) if a detainee who has applied for legal aid, but has not been granted it, is about to be removed.

81. The individuals to whom the Monitor is referring were removed after the Police arrested them on 17 July 1999. Persons who enter Hong Kong illegally commit an offence and are subject to removal under the Immigration Ordinance. Mainland residents who claim right of abode under Article 24(2)(3) must apply for a Certificate of Entitlement in Mainland China. Failing that, and if they enter Hong Kong through clandestine means without a Certificate of Entitlement, they are illegal immigrants. Illegal entry is an offence, and illegal immigrants are subject to removal under the Immigration Ordinance.

82. We cannot comment in detail on the removal on 21 July, as judicial proceedings, brought by the two individuals, are pending. But the removal was completed before court proceedings commenced. Advance notice had been given to the Legal Aid Department that the Director of Immigration was about to remove the two individuals in question. The removal was effected at around 1,500 hours, which is the time at which such removals are routinely made. It must also be noted that, as a matter both of law and of established practice, an application for legal aid does not constitute a reason for a scheduled removal to be withheld.

83. It is true that, in this particular case, there was only a short time between the removal of the two individuals and the beginning of court proceedings for an injunction and judicial review. In the light of that, we are reviewing the circumstances of the case and considering how communications might be improved.

The Immigration Tribunal

84. Justice considers it unsatisfactory that an administrative – rather than a judicial – body determines a person's legal rights in the context of immigration. There is also concern that the Tribunal's decisions are only subject to judicial review on (as is claimed) narrow grounds. The Tribunal has always exercised its jurisdiction independently of the Administration. It functions judicially in the determination of appeals and its composition is similar to that of many magistrates' courts in the United Kingdom. The Tribunal's adjudicators are as qualified to conduct proceedings as are lay magistrates in the UK. And an appeal must be allowed if either one of the adjudicators determining the appeal considers that it should be allowed. The grounds upon which the Tribunal's decisions are subject to judicial review are the same as those of other judicial and public administrative bodies.

Review of removal decisions

85. On pages 21 and 22 of its submission, the Human Rights Monitor says that, when a decision which could be reviewed under section 53(1) of the Immigration Ordinance is made, the person affected is not informed of the right to review. It assumes that this is in order to reduce the potential workload of the Chief Executive in Council. It believes that there is a strong case for devolving the review function of the Chief Executive in Council to an independent review body.

86. Persons to be removed or deported are informed that they have the right of review. Where the Director of Immigration makes a removal order, he must serve a written notice on the person to be removed, informing him of the ground on which the order is made, and his right of appeal to the Immigration Tribunal. If the person decides not to appeal, he is required to give a written declaration to that effect. In a deportation case, the Immigration Department serves the person concerned with a "Notice of Consideration of Deportation", informing him that he can make representations. The grounds put forth by the person will be carefully considered.

87. Objectors are given adequate opportunity and information to present their cases to the Chief Executive in Council, which is independent of the authority that made the decision under review:

that is to say, the Director of Immigration. But the Chief Executive in Council is not the only body that reviews decisions on immigration-related matters. Additionally, persons objecting to decisions of the Director of Immigration may:

(a) Lodge a non-statutory petition to the Chief Executive in person;

(b) Apply to the High Court to seek leave for judicial review of the decision;

(c) In the case of a removal order, appeal to the Immigration Tribunal; and

(c) In cases other than removal orders, make a statutory objection under section 53(1) of Immigration Ordinance to the Chief Secretary for Administration within 14 days of the decision. The objection will be considered by the Chief Executive in Council.

We consider that, together, these channels provide adequate opportunities for appellants to object to decisions of the Director of Immigration.

88. Persons aggrieved by decisions to impose or vary their conditions of stay can lodge either a statutory objection under section 53 or a non-statutory objection. They may also apply for judicial review. These avenues are available to all persons aggrieved by decisions, acts or omissions taken, done or made under the Immigration Ordinance. But there is no statutory requirement to inform objectors of those avenues and it is not the practice to do so unless the persons in question ask. This practice is one that is common among immigration authorities in many jurisdictions. There are no circumstances that are special to Hong Kong that would indicate a need for a different approach.

89. Before 30 June 1997, the Immigration Ordinance provided that the Governor could only make a deportation order against a British citizen (other than a resident British citizen or a United Kingdom belonger):

(a) On the recommendation of a court;

(b) After consideration of the report of a Deportation Tribunal appointed by the Chief Justice; or

(c) Where the Governor certified that the case concerned the security of Hong Kong or foreign relations.

90. This was a privilege arising from the constitutional relationship between the United Kingdom and Hong Kong. The repeal of the relevant provisions of the Immigration Ordinance on 30 June 1997 brought the position of British citizens/UK belongers into line with that of other nationals. The Monitor (page 22 of its submission) considers that, instead, the privilege should have been extended to all non-permanent residents. It also suggests that deportation on the ground of a criminal offence should normally be made after a recommendation has been made by a court.

91. Section 20 of the Immigration Ordinance vests the power to make deportation orders with the Chief Executive, not the Judiciary. That power has been delegated to the Secretary for Security. In considering a deportation case, all relevant factors are given due weight. Those factors include the deportee's family connections and length of residence in Hong Kong and the actual penalty imposed by the court. Guilt or innocence and appropriate sentence for a criminal offence are matters to be determined by the courts in accordance with the law and the principles of criminal justice. But decision as to whether a convicted criminal should be allowed to stay in Hong Kong – or to re-enter

in future – are matters that are entirely appropriate to the Executive authorities. This is because such decisions are based on security, immigration control and other relevant considerations.

Publication and "enactment" of immigration policies

92. On page 36 of its submission, the Monitor proposes that the Government should publish its immigration policies and enact such policies into rules to enable the public and the Legislative Council the chance to know, discuss and amend these policies. The Director of Immigration's powers to make regulations and procedural requirements in relation to immigration matters are provided under the Immigration Ordinance. Information about immigration matters is extensively published and is also available on the Internet. When new policies – or changes to existing policies – that may affect the general public are introduced, the Immigration Department ensures that the public is made aware of them through the media and/or by way of briefings for the Legislative Council. Where a change necessitates an amendment to the Immigration Ordinance, the Legislative Council's consent is necessary.

Article 14: equality before the courts (rights of persons charged with criminal offences)

Legal Aid and the Duty Lawyer Scheme

93. On page 28 of its submission, the Human Rights Monitor says that "tight funding control" over the Duty Lawyer Scheme results in the exclusion of many immigration offences. The Monitor also says that the Legal Aid Department is subject to Government controls over its policies and decisions, particularly in cases where Government decisions or actions are challenged. Consequently, the Monitor says, Government effectively decides which cases come before the courts and which do not. This, they say, is inconsistent with Article 14 because equality before the courts requires that poor people must be provided with legal representation to assert their legal rights.

94. Taking these observations seriatim:

(a) **Funding control**. Over the past three years, the estimates actually incurred under the Duty Lawyer Scheme fell short of budgetary provision. In 1998/99 for example, budgetary provision was in excess of HK$61 million. Actual expenditure totalled HK$53 million. Should expenditure ever exceed such provision, the Service can seek supplementary provision though, as with all such bids, approval would be subject to the availability of resources. Clearly, therefore, the allegation of tight funding control is groundless;

(b) **Offences not covered by the Scheme**. Even if a particular offence or class of offences is not included in the schedule of offences covered by the Scheme, persons accused of such offences may nevertheless secure aided legal representation. 'Non-scheduled' offences that are triable in the District Courts and above are covered by the standard legal aid scheme. Where such offences are triable by the Magistrates Courts, the Duty Lawyer Service has discretion to provide legal assistance where it is considered to be in the interests of justice to do so; and

(c) **Control over policies and decisions**. As stated in paragraph 39 in Part I of the report, the Duty Lawyer Service is independently administered by the legal profession of Hong Kong. Its Council comprises four members each from the Hong Kong Bar Association and the Law Society of Hong Kong, and three lay members. The Service provides legal representation to

virtually all defendants who are charged in the magistracies. If its Administrator (who is a member of the Bar Association) considers it in the interest of justice to do so, she has discretion to grant legal representation to defendants who would not, ordinarily, pass the means test. With due respect to the Monitor, therefore, it is clear that the Service is independently administered.

Article 17: Protection of privacy, family, home, correspondence, honour and reputation

Proposal for a Press Council

95. The proposal is contained in a consultation paper issued by the Law Reform Commission's sub-committee on privacy. It is discussed in paragraph 99 below in relation to Article 19 of the Covenant.

Interception of Communications Ordinance

96. The HKJA regrets the absence of a timetable for the repeal of section 33 of this Ordinance and for the introduction of new legislation on the interception of communications. On page 29 of its submission the Human Rights Monitor expresses similar concerns. As we indicate in paragraph 317 of the report, it is important that any new legislation strikes a proper balance between the rights to privacy and freedom of expression and the need to ensure the effectiveness of the law enforcement agencies in carrying out their duties. This is particularly important in the investigation and detection of serious crime. Our caution and the pace of progress reflect the complexity and difficulty of achieving that balance. Meanwhile, we can assure the Committee that the matter is actively in progress. We are carefully assessing the way forward in the light of comments received and legislation and practices in overseas jurisdictions.

97. The Monitor says that we have declined to provide statistics on the number of interceptions made. We have also been asked to provide information on, among other things, what classes of message are intercepted; the content of any guidelines as to when and how interceptions should be conducted, and so forth. With due respect to the Monitor, we consider that disclosing such information would be contrary to the public interest. This is because it would harm or prejudice the operation, sources and methods of the law enforcement agencies and their ability to prevent, investigate and detect crimes. We assure the Committee that all interceptions are conducted in strict compliance with the law. Adequate safeguards have been built into the system to ensure that the power to make interceptions is not abused.

Article 18: Freedom of religion

98. The Bar Association has asked why Hong Kong Catholics were denied the opportunity of a visit by their religious leader when he posed no threat to public order. As we explained at the time, the Pope is a head of state that does not recognise the People's Republic of China, our sovereign. Indeed, the Vatican maintains 'diplomatic relations' with Taiwan. Hong Kong is an integral part of the People's Republic of China, albeit a Special Administrative Region. As such, our foreign affairs are the responsibility of the Central People's Government (Article 13 of the Basic Law). Since the Pope is head of the Vatican ex officio, no distinction can be made (in the context of foreign affairs) between his political and religious personae. The fact that he was unable to visit Hong Kong in no way restricted the religious freedom of Roman Catholics living there. They remain free to worship, preach, and proselytise. And they can follow the Pope's progress through publications, television, the Internet and the numerous other means that modern technology has made available.

Article 19: Freedom of opinion and expression

Law Reform Commission's (LRC's) proposal for a Press Council for the Protection of Privacy

99. Concerns have been expressed about this proposal which some contributors have seen as a potential threat to press freedom. The proposal appears in a consultation paper issued by the LRC's Privacy Sub-committee, which is not part of the Government. The preamble to the paper makes it clear that it does not represent the final views of either the sub-committee or the LRC. The Government has an open mind towards the recommendations in the paper. We encourage members of the public and the press to forward their views to the LRC. The LRC will publish its report and final recommendations after considering views received. The Government will carefully examine the LRC's final recommendations before taking a view.

Article 23 of the Basic Law

100. Concerns have been expressed about the nature and possible effects of the provisions on secession and subversion in Article 23 of the Basic Law. Those concerns relate particularly to the possible implications for the freedom of expression. The HKJA has questioned the continued non-implementation of the Crimes (Amendment) (No.2) Ordinance passed by the former Legislative Council in 1997.

101. As we have explained in paragraph 358 of the report, we have deferred the commencement of the 1997 Ordinance because it does not fully meet the requirements of the Basic Law. Our examination of the BL23 involves complex issues that require the most careful study. As we have stated in the report, our eventual proposals will be subject to extensive public consultation and will address the concerns regarding the freedom of expression. And, by virtue of Article 39 of the Basic Law, they will need to be consistent with the provisions of the Covenant as applied to Hong Kong.

Official Secrets Ordinance

102. The HKJA has repeated the call for the inclusion of defences on the grounds of public interest and prior disclosure. As we have stated in paragraph 360 of the report, we do not consider that to be necessary. The Ordinance seeks to protect clearly and narrowly defined areas of information against damaging disclosure that would cause or be likely to cause substantial harm to the public interest. This is necessary for the protection of Hong Kong's security and, we believe, consistent with the restrictions in Article 19.3 of the ICCPR.

Refusal of entry visas for overseas Chinese

103. In May this year, 11 overseas Chinese persons unsuccessfully applied for visas to enter Hong Kong in order to participate in a seminar commemorating the 80th anniversary of the 'May 4th Movement' in China. Contributors have said that the decision to refuse them entry violates the freedoms of thought and of exchange of thought.

104. There was no such violation. The applicants and the Hong Kong residents who invited them to attend the seminar had – and continue to have – complete freedom to discuss any subject of their choosing through the numerous electronic options available to them, such as the Internet and video conferencing. We are unaware of any provision in the Covenant – or any other human rights treaty – that confers a right of entry of non-residents into any territory other than their own. And there is nothing in the wording of either Article 18 or 19 to suggest that the freedom of movement as defined in Article 12 must be so extended in the interests of the freedoms of religion and expression.

Code on Access to Information

105. The Hong Kong Journalists Association (HKJA) states that, in late 1997, we tried to rig Government's response to a survey that the Association conducted on the working of the Code. In support of its claim, it cites a memo issued by the Home Affairs Bureau, alleging that the memo incited departments to accord the reporter special treatment. As we explained repeatedly at the time (to the Association, to the press in general and to the Panel), the memo was issued in response to requests from departments for advice on how to handle a reporter's requests for a range of voluminous – and unrelated – documents. The gist of the advice given was that the requests should be handled as provided for in the Code: that is, requests should normally be met – promptly and in full – as a matter of normal practice. They should only be rejected in accordance with the provisions for that purpose in the Code. At no stage did the writer suggest that the applicant be given any special treatment.

106. We do not agree with the conclusions that the HKJA has drawn from its surveys. But we do not find it necessary to dwell on the subject. Suffice it to say that, after the surveys, the Government met the Association to discuss what improvements could be made to our press arrangements. In fact, during the period from 1 July 1997 onwards, the Government has become more open and transparent. Senior officers have been appearing more frequently on live television and radio broadcasts to explain Government policies and respond to questions and comments. The Government spokesman holds weekly briefing sessions for the media. More press conferences have been conducted. All Government bureaux and departments have their own websites, which are freely accessible by members of the public. All Government press releases are instantly uploaded on the Internet. Policy and consultation papers and major speeches by Government officials are uploaded the same day. And the Chief Executive's Office makes a point of answering press enquiries on a same day basis unless that is impracticable.

Freedom of information legislation

107. The HKJA has called for legislation to "set out principles on maximum disclosure of documents and information, minimal exceptions and an effective appeal mechanism". These things are provided in the present Code in that:

(a) It makes clear that disclosure is in the public interest and that, therefore, departments may refuse requests for access only if the public interest in disclosure is outweighed by any harm or prejudice that would result;

(b) It clearly prescribes the exceptions (categories of information that departments may refuse to disclose). Those exceptions were framed with regard to freedom to information legislation overseas and after consulting interested parties, including the Legislative Council and the HKJA; and

(c) A person aggrieved by a department's response may ask for the case to be reviewed by a more senior officer and ultimately, may complain to the Ombudsman, who has statutory investigative powers.

108. That the Code is effective is demonstrated by the fact that, during the period 1 July 1997 to 31 August 1999, 89 per cent of the 4,125 requests under the Code were met in full. This compares with 83 per cent of the 2,538 requests during the period 1 March 1995 to 30 June 1997. That the Code has served its purpose is also evidenced by the fact that – while 18 complaints have been lodged with the Ombudsman during the 66 months since the Code's introduction (1 March 1995) – the Ombudsman has not found any case where a request under it was unjustifiably refused.

Role of the Ombudsman in relation to the refusal of information

109. The Bar Association has asked whether the statutory remit of the Ombudsman enabled her to regard an unreasonable refusal to provide information as "maladministration". The Ombudsman deals with complaints about non-compliance with the Code on Access to Information in the same way as any other complaints alleging maladministration. The Association has also asked whether persons refused access to a document are informed that they may lodge a complaint with the Ombudsman. They are. Paragraph 1.26 of the Code makes it clear that a person who believes that a department has failed to apply the Code properly may complain to the Ombudsman. The guidelines issued to departments also provide that – when replying to requests for review of a decision to refuse an application – departments should advise the applicants that they have the right to lodge complaints with the Ombudsman.

Radio Television Hong Kong (RTHK)

110. Commentators – particularly the HKJA – have expressed concerns about RTHK's continued editorial independence. These concerns first surfaced in response to remarks made by a member of the Chinese People's Political Consultative Conference. More recently, it returned to prominence following our response to an interview in which a representative of a Taiwan organisation spoke about the so-called "state-to-state theory". The concerns focused on our comment that it was inappropriate for the spokesman to put forward these views publicly in Hong Kong. As we have explained in other contexts, our comment related entirely to the representative himself and related entirely to his special status as a representative of a Taiwan organisation. It did not relate in any way to any other person and in no way impinges on the freedom of speech enjoyed by the people of Hong Kong, which is protected by the Basic Law.

Flags

111. On page 32 of its submission – and with reference to paragraphs 371 and 372 of the report – the Human Rights Monitor (in common with others) says that the flag-related Ordinances[4] are unnecessary: "no European Union member state has similar legislation" (sic). Our basic position remains as explained in paragraphs 364 to 370 of the report. Since the report's submission, research has revealed that at least 44 jurisdictions have specific legislation protecting national symbols. Seven of them are member states of the European Union and 37 are Parties to the Covenant. The laws in question either protect the jurisdictions' own national symbols, or those of foreign states, or both.

112. Of interest in this context is the ruling of the Italian Supreme Court that the provision in the Italian Panel Code criminalising flag desecration is compatible with the free speech guarantees in the Italian Constitution and the European Convention on Human Rights. In the case of *Paris Renato,*

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[4] The National Flag and National Emblem Ordinance and the Regional Flag and Regional Emblem Ordinance.

No. 3355/88, the Supreme Court of Cassation held that criticism of the institutions in force and of any element of the State, even severe, is accepted in a democratic regime. However, when the expression of thought is aimed at denying respect for the emblems of the State, the expression is not a mere criticism but conduct that insults the public. Public criticism of constitutional institutions and State emblems is considered lawful only when it is expressed, without transcending into contempt and mockery, within a civil and democratic dialectic.

113. The constitutionality of the offences under the two flag-related Ordinances has recently been the subject of proceedings before the Court of Final Appeal, whose judgement has yet to be delivered.

Self censorship

114. On page 33 of its submission, the Monitor says that the addition of "national security" as a ground for the prohibition of public gatherings and the legal registration of a society has made political discussion related to the independence of Tibet and Taiwan a taboo. It also says that there have been reports that television stations either banned or abridged documentaries on the possible independence of Xinjiang and Tibet. The fact is that there is no political censorship of films. All licensed broadcasters in Hong Kong enjoy full editorial freedom. Neither the Government nor the Broadcasting Authority either preview or censor broadcasting materials.

115. In this context, on page 35 of its submission, the Monitor cites as 'evidence' of self-censorship the removal of an advertisement for a book by Mr Lee Teng-hui from a station owned by the Mass Transit Railway Corporation (MTRC). The facts are that:

(a) The advertisement was inadvertently removed by the advertising company hired by the publishers. The MTRC was not involved in the process;

(b) The advertising company offered to re-post the advertisement with a seven days extension; and

(c) The publisher accepted the offer and the advertisement was on display from 31 July to 13 August 1999.

Article 22: Freedom of peaceful assembly and association

The Societies Ordinance and the Public Order Ordinance

116. Contributors have reiterated concerns that the 1997 amendments to these Ordinances have compromised the freedoms of assembly and association. In particular, Justice and others have expressed doubts as to whether the new ground of national security for banning a society is consistent with the standard of "prescribed by law" under Article 22. They have also questioned the proportionality of the Police response to some of the public demonstrations over the past two years. These points are addressed in the following paragraphs.

Concept of "national security"

117. The Human Rights Monitor comments extensively on this question in chapter 8 (pages 39 to 46) of its submission. Its views are, we believe, essentially representative of those expressed by other contributors and, for convenience, we will focus our discussion on them. The Monitor says that the term "national security" raises fears that Mainland practices may be extended to Hong Kong.

The NGO community did not pose any threat to Hong Kong that might justify a tighter leash on the formation and operation of societies. And the concept is inconsistent with both the Siracusa Principles and the Johannesburg Principles. On page 43, the Monitor says that the absence of any qualifying requirement of the use or the threat of use of force in the relation to national security sets a bad precedent for future legislation under Article 23 of the Basic Law. Moreover the ground of "national security" fundamentally alters the role of the Police force because the police are now required to judge whether a society is a threat to the territorial integrity and the independence of the PRC rather than to "regulate on the (familiar and non-political) grounds of public order and safety". The Police are thus empowered to exercise political censorship of societies when they apply for registration or exemption, to monitor their activities at all times, and to prohibit them if required.

118. To set these views in context, the Societies (Amendment) Ordinance 1997 (No. 118 of 1997) reinstates the registration system for societies which was repealed in 1992. It provides that a local society (or its branch) must apply to the Societies Officer for registration or exemption from registration within one month of its establishment. New Section 2(4) defines "national security" to mean the "safeguarding of the territorial integrity and the independence of the People's Republic of China". New Section 5A sets out – inter alia – the grounds for refusing registration. The 'interests of national security' is one such ground.

119. The Bills Committee that scrutinised the new provisions at the drafting stage noted that the definition in section (then clause) 2(4) did not refer to the use or the threat of use of force. But it also noted that it was settled law that the Covenant itself provides no definition of the meaning of "national security". Siracusa Principle 29 states that "national security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force". Principle 2 of the Johannesburg Principles employs the similar term "against force or threat of force". We consider that the Ordinance complies with the Covenant. However, those who consider that such compliance is contingent on satisfying the above principles can seek to challenge the Societies Ordinance in court on that basis. If this were done, the court could determine whether or not that view was correct.

120. New Sections 5A and 5B of the Ordinance provide a detailed mechanism for applicants to make representations in support of their applications; to show cause why those applications should not be refused; to be given reasons for such refusal; and to appeal to the Chief Executive in Council. Aggrieved applicants are entitled to apply for judicial review against the decision of the Societies Officer and the case will then be determined by the Courts. In determining the meaning of "national security", the Judiciary will no doubt have regard to the submissions of counsel which may also refer to the relevant provisions of the Siracusa and Johannesburg Principles.

121. The principles and provisions in respect of the registration system are in compliance with the decision of the National People's Congress of 23 February 1997, the provisions of the Basic Law, and – in our view – the Covenant as applied to Hong Kong. The new system seeks to strike an appropriate balance between the respective claims of civil liberties and social order.

Policing of societies

122. On page 45 of its submission, the Monitor says that at least one society was not registered because it used a post box as its office address. It also questions the practice of seeking proof that the landlord of premises adduced as a society's address has agreed that the society may use the premises. The fact is that the Police have not objected to any applications for the formation of societies since the reunification. Post boxes are accepted as office addresses if – by their nature – the societies concerned do not require physical premises for their office address (that is, they do not

need to provide dedicated accommodation for a secretariat or for the purpose of their activities). The Police request proof of landlords' agreements because there have been instances where landlords have complained that their premises have been registered as a society's office address without their (the landlords') knowledge or permission.

Freedom of assembly

123. As we said in paragraph 380 of the report, peaceful demonstrations remain very much a way of life in Hong Kong, as witness the some 4,300 demonstrations held between 1 July 1997 and 31 August 1999. So far, the Police have objected to just one public meeting and two processions on the grounds of public safety and order. In each case, they have withdrawn their objections when the applicants have revised their proposed routes, venues or scale of participation. Public meetings and processions have mostly been peaceful and orderly and have resulted in only 16 people being prosecuted, of whom 15 were convicted. We therefore see no evidence in support of the concerns regarding the freedom of assembly.

Police response

124. The Police have continued to exercise maximum restraint in the handling of demonstrations. They use force only when absolutely necessary, and then only the minimum necessary. They have the statutory duties to preserve public order and safety and to regulate public processions and assemblies. In regulating public processions, the Police seek to strike a balance between the rights of participants to express their views freely and the need to ensure that no danger or inconvenience is caused to others. Establishing designated demonstration areas is a reasonable measure to ensure this.

Freedom of association

125. In paragraph 389 of the report, we indicated that there was no evidence to support the view that the amendments to the Societies Ordinance had unduly restricted the freedom of association. As we pointed out there, 883 societies were formed between 1 July 1997 and 30 June 1998. The trend has been vigorously sustained with a further 1,373 societies being formed between 1 July 1998 and 31 August 1999. Throughout the two periods, the Commissioner of Police has not objected to any applications for the formation of societies. Nor has the Secretary for Security made orders prohibiting the operation of any society.

126. In this context, the Democratic Party (with the support of the Human Rights Monitor) has said that an application under the Societies Ordinance to register an association – to be known as "Never Forget June-Fourth" – has been unduly delayed. They have called for an explanation. The application is being processed by the Societies Officer (the Commissioner of Police) in accordance with the Societies Ordinance (Chapter 151). The process has taken some months because the Societies Officer has had to ask for additional information (which has also required some clarification) to assist him in the consideration of the application.[5] Each application must be examined carefully and the time taken to do so varies from case to case.

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[5] These requests were made in accordance with section 15(1) of the Ordinance which provides that the Societies Officer may, at any time, require a society to furnish him in writing such information as he may reasonably require for the performance of his functions under the Ordinance.

Right to protection from anti-trade union discrimination

127. The Monitor says (on page 50 of its submission) that the Government should provide effective protections against and remedies for anti-union discrimination. Among other things, such protections should include vigorous prosecutions of employers who take retaliatory measures against their employees, and amending the Employment Ordinance to include the right to reinstatement without prior mutual consent.

128. We take a serious view of complaints of anti-union discrimination. Each case is thoroughly investigated. The employment protections for employees against trade union discrimination under the Employment Ordinance were strengthened on 27 June 1997 with the enactment of a new provision under the Employment Ordinance whereby any employee who is unreasonably and unlawfully dismissed for exercising trade union rights is entitled to claim for remedies against the employer concerned. The Labour Tribunal may make an order for reinstatement or re-engagement subject to the prior mutual consent of both the employer and the employee, award terminal payments and compensation of up to HK$150,000. However, we recently completed a review of the requirement under the Ordinance that reinstatement must be on the basis of mutual consent. We will shortly consult the Labour Relations Committee of the Labour Advisory Board on our findings.

129. The Employment Ordinance (chapter 57) prohibits employers from dismissing employees for exercising trade union rights. Employers are also prohibited from preventing or deterring employees from exercising trade union rights, penalising or discriminating against employees for exercising those rights, or making it a condition of employment that employees must not exercise these rights. Any employer who contravenes these provisions shall be liable to prosecution and, upon conviction, to a fine of HK$100,000. We consider that these provisions afford sufficient protection to employees in exercising trade union rights. The question of such protections is discussed in greater detail in paragraphs 128 to 130 of our report under the ICESCR, in relation to Article 8 of that Covenant.

Right to form trade unions

130. On pages 46 to 48 of its submission, the Monitor cites the Report of the Committee on Freedom of Association of the Governing Body of the ILO ("the Report") on case no. 1942 concerning the occupational requirement for trade union officers in the HKSAR. Under section 17(2) of the Trade Unions Ordinance (TUO: Chapter 332), any person who is not or has not been engaged or employed in the trade, industry or occupation of the trade union concerned can only be an officer of the union with the consent of the Registrar of Trade Unions. And section 17(6) provides that anyone contravening section 17(2) is liable to a fine of $1,000 and to six months imprisonment. The ILO found these provisions inconsistent with ILC 87 and requested their repeal.

131. Between January 1980 and September 1999, there were 29 applications involving 17 unions for consent under that section. All were approved. In our view, this demonstrates that the law is sufficiently flexible in regard to the election of trade union officers who belong to other trades. Nevertheless, we are reviewing the requirement and have informed the ILO that we are doing so.

Right of trade unions to function freely

132. Also on page 50 of its submission, the Monitor says that the Trade Unions Ordinance unduly restricts the use of union funds. It calls for the repeal of the relevant provisions. The reference is to sections 33(1)(j) and 34 of the TUO that became law with the enactment of the Employment and Labour Relations (Miscellaneous Amendments) Ordinance 1997. The

amendments so effected were unanimously agreed by the Labour Advisory Board after considering the results of a Labour Department review of the major provisions of the TUO. Employees and employers are equally represented on the Board: all six-employee representatives are trade unionists.

133. We do not consider that the provisions amount to a blanket prohibition on the use of union funds for political purposes. Rather, they provide that trade unions can set up electoral funds to defray expenses incurred in the elections of the Legislative Council, the municipal councils and the District Boards. In our view, the provisions are broad enough to enable trade unions to use their funds to promote the interest of their members. Additionally, unions can, with the approval of the Chief Executive, contribute or donate funds to trade unions established outside Hong Kong and for other purposes. Nevertheless, we are reviewing these provisions.

Article 23: The family

134. In paragraph 241 of the report, we expressed the view that neither the law (the Immigration No. 3 Ordinance) nor our policies created split families. If families did live apart, it was because they had chosen to do so. Hong Kong permanent residents had the right to leave Hong Kong and to join families in the Mainland. Justice cites this statement in support of its view that "the HKSAR Government displays scant and discriminatory regard towards the protection of the family as the natural and fundamental group unit of society."

135. We cannot, of course, accept that view. As we state in paragraph 417, Mainland China is our principal source of immigration for permanent settlement. Some 90 per cent of all such immigrants come to Hong Kong for the purposes of family reunion. That remains the case and, over the years, we have gradually increased the daily quota for such migration to the present 150 a day: over 54,000 a year. In the circumstances – and in view of the obvious constraints on population growth in what remains one of the most crowded places on Earth – the assertion that we pay scant regard to the protection of the family is patently absurd.

136. The view to which Justice takes exception is not ours alone. For example, Justice Chan, CJHC, in his judgement given on the *Chan Kam Nga v. D of Immigration* case on 20 May 1998 said:

> "... the permanent resident may be split from his children and family. But it would be a split of his own choice. He had chosen to leave his children and family in Mainland China and come to stay in Hong Kong for seven years in the first place ... The situation would be similar to a person who has gone abroad to work or to further his studies and has subsequently acquired citizenship in another foreign country. With respect, I do not see the anomaly."

Neither do we. We continue to do the utmost that is practical within our resources – and the capacity of our socio-economic infrastructure – to promote and support family reunion.

'Population policy'

137. The concern has been expressed that the recently announced policy of encouraging talented persons from Mainland China to work in Hong Kong is potentially prejudicial to those wishing to enter Hong Kong for family reunion. As such, it is said, the policy is inconsistent with our obligations under Article 23 of the Covenant.

138. These misgivings are unfounded. The proposal is to permit the entry of Mainland residents with skills and talents not readily available in Hong Kong to work there. Essentially, their position will be the same as that of expatriates from other countries. That is, they will be in Hong Kong to work, not to settle. They will have to meet stringent skills and qualification requirements before their application for entry into Hong Kong is approved. They will have to renew their work visas at staggered intervals (the same that apply to 'expatriates') and will only acquire the right of abode if they complete seven years of ordinary residence here. They will not be counted against the 150 daily quota of persons entering for permanent settlement.

139. The position of those waiting to enter Hong Kong for family reunion is completely different and will remain as it is now. That is, they will – as now – continue to include persons who are eligible for the right of abode under the provisions of Article 24 of the Basic Law and who therefore have the right of abode from the outset. As now, their skills or lack of them will in no way impinge on their eligibility. For these reasons, the allegation that the new policy is inconsistent with the requirements of Article 23 is, in our view, without foundation.

New arrivals from China

140. Justice suggests that 'Government propaganda' has exacerbated prejudices against new arrivals from the Mainland. This is not the case and there has been no 'propaganda'. On the contrary, we have been doing a great deal to help the new arrivals to integrate into the community: paragraphs 422 to 425 of the report refer.

Article 25: Right to participate in public life

141. Contributors have expressed concern about the pace of development towards universal suffrage, the functional constituency system, the composition of the Election Committee and the method for selecting the Chief Executive. It is alleged to be another effort to give undue power to the business and professional sectors. They have also said that the electoral system – particularly the functional constituencies – imposes structural obstacles to the equal participation of women. And there is concern that the reintroduction of appointment to the district councils and the abolition of the Municipal Councils have made the system less representative. These concerns are addressed in the following paragraphs.

The pace of democratic development

142. The Basic Law prescribes the blueprint for the development of representative government in Hong Kong. It provides for a steady increase in the number of Legislative Councillors to be returned by geographical constituencies: 20 in the first term (which started in 1998), 24 in the second term (due to start in 2000) and 30 in the third term (due to start in 2004). The ultimate aim is the election of all 60 Councillors by universal suffrage. The Basic Law also prescribes a mechanism for a decision to be taken on whether the method for the formation of the Legislative Council and the procedure of Legislative Council for voting on bills and motions should be amended after the year 2007. Whether the conditions are ripe for electing the entire Legislative Council by universal suffrage immediately after 2007 should be decided by the whole community after informed discussions.

The Legislative Council

143. The election of the first term Legislative Council in May 1998 was held in accordance with the provisions of the Basic Law. The record number of voters and candidates ensured the election of

a credible and representative Legislative Council. The results of the election demonstrated that the List Voting system adopted in the geographical constituency elections ensures that parties will win seats in proportion to the actual level of support that they enjoy in each constituency.

The Election Committee and the method for selecting the Chief Executive

144. Annex I of the Basic Law provides that the Chief Executive shall be elected by a broadly representative Election Committee in accordance with the Basic Law. The Basic Law also provides that the ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures. It also provides a mechanism for a decision to be taken on whether the method for selecting the Chief Executive should be amended after 2007.

Functional constituencies

145. These constituencies have been part of Hong Kong's electoral system since 1985, when elections to the Legislative Council were first held. Their purpose is to provide a representative voice for various sectors in the territory that have significantly contributed to the community. Before 1985, all Legislative Council Members were appointed. By convention, a number of appointees came from sectors of the community that were substantial and important. Representatives of the sectors made use of their specialist or professional knowledge to contribute to the work of the legislature. When elections to the Legislative Council were introduced in 1985, the community agreed that an appropriate way to enable these sectors to continue their contribution would be through the functional constituencies. This has proved to be an effective arrangement for ensuring a representative Legislative Council by allowing different sectors that have made significant contribution to our community to have a voice in the legislature.

The Provisional Municipal Councils

146. In paragraphs 472 and 473 of the report, we advised the Committee that we were assessing responses to a public consultation that we had undertaken with a view to enhancing the efficiency and cost-effectiveness of the Municipal Councils and the District Boards. After careful consideration of the public's views, we concluded that the Provisional Municipal Councils should not be retained after the incumbent members' terms of office expire on 31 December 1999. Instead, we proposed establishing a new structure for the delivery of policy direction and services in the areas of food safety and environment hygiene, as well as arts and culture and sports and recreation. To that end, we proposed that, from 1 January 2000, these things should be provided by:

(a) A new Environment and Food Bureau[6], to be underpinned by a new Food and Environmental Hygiene Department and the existing departments of Agriculture and Fisheries and Environmental Protection;

(b) A new Leisure and Cultural Services Department under the direction of the Home Affairs Bureau; and

(c) At the district level, the 18 Provisional District Boards to be known as 'District Councils' and to be given additional resources and responsibilities. These proposals received the

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[6] In the Hong Kong Government structure, bureaux are responsible for policy formulation. Departments put those policies into practical effect.

support of the Legislative Council when, on 10 March 1999, it voted the related District Councils Bill into law. Elections to the District Councils will be held in November 1999.

147. The proposal to dissolve the Provisional Municipal Councils after the terms of office of their members expire is not a roll back in democracy. Indeed, it will enhance the Legislative Council's role in monitoring Government's policies and the use of public funds for municipal services. The new 'District Councils' will also have an enhanced role in the monitoring of Government services at the district level. We also believe that the Government's assumption of direct responsibility for food safety and environmental hygiene will improve co-ordination in policy formulation and the delivery of services. It will enable us better to respond to food safety crises and major environmental hygiene incidents. This view received the support of the Legislative Council when it approved the District Councils Bill.

Appointments to the District Councils

148. During the public consultations on the structure and functions of our district organisations (paragraph 147 above), many respondents indicated support for an appropriate number of members to be appointed to the District Councils. Appointed membership will enable suitable persons interested in district affairs to serve on the relevant District Councils. Experience has shown that appointed members can bring a wider spread of expertise and experience to the Districts they serve. Again, the Legislative Council endorsed this view in March this year, when it voted the District Councils Bill into law.

Democratic development

149. The Democratic Party has urged us to study the possibility of subsidising election candidates in accordance with the percentage of votes they gain. This, they say, would encourage public participation in public life. But the Government already provides substantial subsidies in kind to candidates contesting elections to the Legislative Council and the District Councils. These include two rounds of free mailing services (one round in the case of District Councils elections), free production of a series of election programmes on television and radio for candidates to introduce their election platforms and to debate topical issues, and the free production of leaflets to introduce candidates to every registered elector. Against this background, we do not think that further subsidies of this kind would be an appropriate use of public funds.

Rural elections

150. Some commentators consider that the Chairmen of the Rural Committees are insufficiently representative. But the fact is that they are returned by election. In most Rural Committees, the Chairmen are elected by full general assemblies that are mainly comprised of village representatives of the relevant rural area. In other cases, the full general assemblies elect the executive committees. The latter, in turn, elect the Chairmen.

151. The Human Rights Monitor says (on pages 5 and 6 of its submission) that many villages still refuse to allow women to vote in village elections and that Government's efforts at combating discrimination in those elections have been half-hearted. It also states that Village Representatives are elected on a household basis. Taking these points seriatim:

(a) **Participation of women**. We addressed this issue in paragraphs 72 and 73 of the report in relation to Article 3[7]. As we state there, and in accordance with the Sex Discrimination Ordinance, the Government does not recognise – or will withdraw its recognition of – any Village Representatives who are returned by a procedure in which women have not been able to participate on equal terms with men[8]. At the time of writing the report, we said (in paragraph 72) that 96 per cent of all villages had adopted the model rules. Now, all of them do. Thus, the Monitor's statement conflicts with our understanding of the position. We have asked the Monitor supply us with facts to support its position. If it is able to do so, we will gladly take follow up action; and

(b) **Village Representatives "elected on a household basis"**. They are not: **all** Village Representatives are now elected on a one-person-one-vote basis in accordance with the Model Rules promulgated by the Heung Yee Kuk.

152. Justice has said that the report 'fails' to mention allegedly discriminatory practices in the election of village representatives. We assume that the 'omission' referred to concerns the issues in the two cases – currently under appeal – of the village elections in Pat Heung and Po Toi O. The report did not address those issues because the applications for judicial review that brought them to light were made well outside the report's cut-off date (30 June 1998). We cannot appropriately respond at this stage because the Government has appealed against the decision of the Court of First Instance and the matter is sub-judice.

153. In the longer term, we intend to bring the village representative elections within the framework of the law. Once the legislation is in place, our intention is that rural elections should also be subject to either the Corrupt and Illegal Practices Ordinance (Chapter 288), or to the future Elections (Corrupt and Illegal Conduct) Ordinance. We expect this to provide further safeguards for equal participation in the electoral process. A Government working group is studying the issues with a view to formulating concrete proposals for the achievement of this aim.

Government advisory boards and committees

154. The HKJA has called on Government to further open its advisory bodies to the public, starting with those that deal with transport, broadcasting, education, environment and town planning. In general, we encourage all advisory bodies to open up their meetings as far as practicable. But some bodies – particularly those dealing with the matters on the HKJA 'wish list' – handle information that is classified, commercially sensitive and/or involves personal data. Some bodies are consulted at the initial stage of policy formulation and disclosure of the information before them – that may derive from incomplete analyses, research or statistics – would be premature. Clearly, therefore, it would be inappropriate for those bodies to open their meetings to the public.

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[7] We addressed this issue in relation to Article 3 because we took the view that the principal issue was gender equality rather than the right to participate in public life. On reflection, we probably should have discussed this in relation to Article 25 as we do here.

[8] Such non-recognition is not – as Justice has implied (page 12 of its submission) – a toothless sanction. On the contrary, it debars such a representative from election to either a rural committee or to the Heung Yee Kuk.

155. Nevertheless, bodies whose meetings are not open recognise the need for greater transparency and accountability in an increasingly open society. To that end, they have introduced a range of transparency measures as such issuing press releases, holding press briefings, and making agendas and relevant papers available to the public. We will continue to liaise closely with these bodies to monitor the need for further moves towards greater transparency.

Article 26: Right to equal protection before the law

Anti-discrimination legislation

156. Commentators have called for specific legislation against discrimination on the grounds of age, race and sexual orientation. Our position is as explained in paragraphs 497 to 505 of the report.

157. Although there is no specific legislation against racial discrimination, there are adequate provisions in our domestic law to prohibit racially motivated acts of violence (or the incitement to such acts), and activities, whether of individuals or organisations, aimed at inciting racial hatred. The right to security of the person is principally guaranteed through the Offences Against the Person Ordinance which makes it an offence in law to assault or wound anyone. There is no distinction as to race, colour, or national or ethnic origin. The penalty for committing such an offence varies depending on the gravity of the assault. And section 8 of the Societies Ordinance provides that an order may be made prohibiting the operation of a society where it is considered that its operation may be prejudicial to the security of Hong Kong or to public safety or public order (*ordre public*).

158. Additionally, section 33(1) of the Television Ordinance (Chapter 52) prohibits broadcasts that incite hatred on account of colour, race, sex, religion, nationality or ethnic or national origin. Section 13M(1) of the Telecommunication Ordinance (Chapter 106) contains a similar prohibition. Similarly, approval for exhibition of a film may be refused under section 10(2) of the Film Censorship Ordinance if the film denigrates or insults any particular class of the public by reference to the colour, race, religious beliefs or ethnic or national origins or the sex of the members of that class. And the Codes of Practice on Programme Standards for television and radio broadcasts in Hong Kong also contain provisions to forbid the broadcast of any programme which is likely to encourage hatred against or fear of, and/or considered to be denigrating or insulting to any person or group on the basis of ethnicity, nationality, race, gender, sexual preference, religion, age, social status or physical or mental disability.

Remedies in respect of racial discrimination

159. Although there is no single remedy available for all types of racial discrimination, there are particular remedies. For example, a person who is assaulted for racial reasons can bring civil proceedings for compensation. If there is evidence that material is to be broadcast that is likely to incite racial hatred, the Chief Secretary may apply to the court (under section 33 of the Television Ordinance or section 13M of the Telecommunications Ordinance) for an order to prohibit the broadcasting of the programme. It is also possible that, in certain circumstances, Article 39 of the Basic Law may enable a person to challenge racially discriminatory conduct in court.

Prosecution policy of the Department of Justice

160. In paragraphs 310 and 311 of the report, we discussed the decision of the Director of Public Prosecutions not to initiate prosecutions in respect of eight cases referred to him by the Privacy

Commissioner. One of those cases involved the New China News Agency (commonly referred to by its Mandarin name 'Xinhua'). On page 26 of its submission, the Human Rights Monitor says that the decision was inconsistent with Articles 2 and 17 of the Covenant. The Monitor calls for clarification as to how public policy was entailed. And, because the Privacy Commissioner took six months to complete his investigations into the case involving Xinhua, it considers that either the Commissioner should expedite such investigations, or Government should amend the Personal Data (Privacy) Ordinance to extend the (six month) time limit for prosecutions brought under it.

161. For the reasons in paragraph 311 of the report, to disclose the precise reasons for not prosecuting particular cases would wrongly open the issues of guilt and innocence to public debate. The persons involved could find themselves convicted by the media and the bar of public opinion, without the opportunity of defending themselves before properly constituted courts. As we state there, that could not be countenanced.

162. With due respect to the Monitor, Xinhua was not given special treatment. Nor is there any substance in the Monitor's contention that – because Xinhua is an unincorporated association with no legal personality – it was immune from the legal process and "practically above the law." Unincorporated associations are well-recognized institutions in all common law jurisdictions. Partnerships (including partnerships of solicitors) are a common example. The fact that such associations do not have a separate legal personality means that legal proceedings in respect of them must be brought or defended by the individuals who make up the association and who, thereby, are personally subject to the full rigour of the law.

163. The Privacy Commissioner has proposed amending the Ordinance with a view to extending the six-month limit. The Government is considering this.

164. Contributors have reiterated concerns about the decision of the Secretary for Justice not to prosecute a well-known personality. They have called for prosecution decisions to be made in accordance with established guidelines.

165. As we have explained in paragraphs 508 to 512 of the report, prosecution decisions are indeed made in accordance with long-established guidelines and criteria. The reason for not prosecuting the person in question was that there was insufficient evidence. That ground alone was sufficient to dispose of the matter. Public interest considerations were only taken into account because of representations submitted by counsel for the person concerned. There was a combination of public interest factors that, taken together, were totally exceptional. Research into the practices in 11 leading common law jurisdictions has established that prosecution agencies in other jurisdictions may take similar considerations into account when deciding whether or not to prosecute.

Maternity Protections for Domestic Workers

166. On pages 51 and 52 of its submission, the Monitor refers to a Government proposal to introduce flexible arrangements in the maternity provisions for live-in domestic helpers. The proposal – which is all it is at present – is that:

(a) All the provisions under the Employment Ordinance, including those on maternity protection, should continue to apply to live-in domestic helpers; but

(b) In view of their unique employment circumstances, live-in domestic helpers who become pregnant, and their employers, should have the flexibility to mutually agree to dissolve the

contract of employment. Should they so agree, the employer would, it has been proposed, have to pay the helper a specified amount of compensation. Helpers who did not so agree, would continue to enjoy the existing maternity benefits provided for by law, including legal protections against dismissal.

167. There have been concerns that the proposal is discriminatory. We do not share that perception. The changes that it would entail – if endorsed – would apply equally to both local and foreign live-in domestic helpers. Its purpose is to address the practical difficulties that pregnancy can entail in the unique circumstances of employer and employee sharing the same living space. And, in our view, the proposed flexibility would ensure that the arrangements were proportionate to the difficulty that they are intended to resolve. We have consulted interested parties on the proposal and are currently examining the views received. We will consider the way forward when we have completed that examination.

Article 40: Submission of reports

168. The Hong Kong Human Rights Commission says that our practice of consulting the public on the basis of outline reports (as opposed to draft reports), violates UN reporting requirements. As we see it, our practices are almost identical to those of the Canadian Government that are cited in the Manual on Human Rights Reporting as "instructive". Like the Canadians, we invite NGO's contributions to our reports. But we also extend that invitation to the general public (though, in practice, only NGOs have responded). Like them too, we undertake to consider all comments that are submitted and to relay them to the relevant bureaux and departments for comment. And, again, like the Canadians, we do not undertake to address each specific comment in the reports. Nevertheless, we generally address over 90 per cent, albeit usually in summary form. In 1995, according to the Manual, Canada's invitations attracted four responses in relation to the ICCPR and 10 in relation to the ICESCR. We attracted 11 in both cases. When the current edition of Manual was published, the Canadian authorities were considering using the Internet to solicit information from a wider audience. We already do that. Additionally, we encourage NGOs to submit their own reports and to attend the hearings. Hong Kong NGOs are well aware of this and have not been slow to respond. This ensures that the treaty monitoring bodies have access to information from all perspectives, not just those of the Government.

Reservations and declarations

169. Contributors have called for the withdrawal of the reservation against Article 25(b) concerning elections to the Legislative and Executive Councils. Under Basic Law Article 39, all provisions of the ICCPR as applied to Hong Kong before the reunification have continued to apply to the HKSAR. We are reviewing the reservations that were entered before the reunification to see if any of them could be removed or modified. We have not yet concluded that exercise but will need to retain some reservations, including that against Article 25(b), either in their present or in modified form.